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No. 89-1556

# In the Supreme Court of the United States

OCTOBER TERM, 1989

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MARGARET T. WHITACRE, PETITIONER

*v.*

JAMES F. DAVEY

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the district court correctly dismissed this *Bivens* action on the grounds of qualified immunity.

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### OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-11a) is reported at 890 F.2d 1168. The decision of the district court (Pet. App. 15a-21a) is reported at 727 F. Supp. 636.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 14a) was entered on November 17, 1989. A petition for rehearing was denied on January 5, 1990. Pet. App. 12a. The petition for a writ of certiorari was filed on April 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Respondent is the Clerk of the United States District Court for the District of Columbia. In August 1985, respondent announced a reorganization of the Office's management structure. Pursuant to the reorganization, the Office's two Assistant Clerk positions, one of which was occupied by petitioner, were replaced by a single Chief Deputy Clerk position. Petitioner and the other Assistant Clerk, Nancy Mayer, applied for the new Chief Deputy Clerk position. Mayer was selected. Pet. App. 2a.

Petitioner thereafter lodged an administrative complaint with the district court's Equal Employment Opportunity (EEO) officer, charging that Mayer's selection was the product of age discrimination. At the time, Mayer was 31 years old and petitioner was 51 years old. After conducting an informal investigation, the EEO officer issued a report rejecting petitioner's charge. Pursuant to the applicable procedures, the Chief Judge of the United States District Court then reviewed the EEO officer's determination. The Chief Judge summarily affirmed the EEO officer's decision. Pet. App. 2a-3a.

2. a. In October 1987, petitioner brought this action in the United States District Court for the District of Columbia, naming as defendants respondent and the EEO officer. Petitioner alleged that by abolishing the two Assistant Clerk positions and selecting Mayer as the Chief Deputy Clerk, and by denying petitioner's administrative EEO claim, the defendants had unlawfully discriminated against her on the basis of age, in violation of the Fifth Amendment of the United States Constitution. Relying on *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388

(1971), petitioner sought damages against the defendants in their individual capacities. Pet. App. 3a.

In her amended complaint, petitioner asserted that the EEO officer should have recused herself from this matter, on the ground that she was a friend of Mayer, the recipient of the position. Amended Compl. ¶¶ 23, 35 (C.A. App. 22, 24). With respect to respondent, petitioner averred that the decision to replace the two Assistant Clerk positions with a single Chief Deputy Clerk position, and Mayer's selection as Chief Deputy Clerk, occurred "as a result of [petitioner's] age and the fact that Nancy Mayer is twenty years younger than [petitioner]. This reflects a pattern of selections by [respondent] that have been based upon age." Amended Compl. ¶ 20 (C.A. App. 21). Petitioner alleged that (Amended Compl. ¶ 19 (C.A. App. 21)),

> [f]rom January 1981 until December 1985, [respondent] has made 20 appointments to professional positions, including supervisory positions, within the Clerk's Office. Of these, only three times did he select an individual aged 50 or over, and twice, that individual was [petitioner]. In all the remaining selections, the individuals were aged 42 or under at the time of selection. The average age of these selectees at the time of selection was 35.3 years of age.

Relying solely on those allegations, petitioner asserted that respondent had "violated [her] constitutional rights intentionally, willfully and maliciously." Amended Compl. ¶ 33 (C.A. App. 24).

b. The district court (Sentelle, J., sitting by designation) granted the defendants' motion to dismiss. Pet. App. 15a-21a. The district court observed that in a *Bivens* action for damages, a defendant is entitled to qualified immunity unless the plaintiff has

sufficiently alleged a violation of "clearly established" constitutional rights. Pet. App. 19a-20a. Accordingly, the court explained, a plaintiff must allege "concrete facts" supporting the charge of unconstitutional discrimination. *Ibid.* The district court concluded that neither the original complaint nor the amended complaint satisfied that standard.

In particular, the court stated that although "[d]iscriminatory purpose or intent is an essential element of a constitutional tort action for discrimination in employment" (Pet. App. 20a n.2, citing *Washington* v. *Davis*, 426 U.S. 229 (1976)), "[p]laintiff's original Complaint merely alleged bare conclusions that [respondent] acted with the requisite intent to discriminate against her on the basis of her age" (Pet. App. 20a). Moreover, the court added, the amended complaint "adds only what [petitioner] apparently deems to be a statistical foundation for a pattern or practice of age discrimination." *Ibid.* Referring to the statistical allegations in paragraph 19 of the amended complaint (see p. 3, *supra*), the court stated that "[a]ssuming that circumstantial evidence, including statistical evidence of a pattern or practice, may be sufficient to establish discriminatory purpose or intent for the purpose of an equal protection claim in a *Bivens*-type action by a disadvantaged employee, the current allegations are not sufficient." Pet. App. 21a. The court explained that "statistical evidence of disparate impact is competent only when it accurately reflects the available pool of applicants. * * * [Petitioner's] amended complaint supplies us none of this. It may be that three selections is [*sic*] disproportionately small to the pool, disproportionately large or approximately statistically perfect. Plaintiff does not say. The court does not know." *Ibid.* Because there were no other relevant

allegations, the district court granted respondent's motion to dismiss. *Ibid.*[1]

3. The court of appeals affirmed. Pet. App. 1a-11a. Quoting this Court's decision in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the court observed that meritless *Bivens* claims impose substantial "cost[s] not only [on] the defendant officials, but [on] society as a whole." Pet. App. 5a. For that reason, the court noted, the *Harlow* case makes clear that " '[b]are allegations of malice' do not suffice to expose federal officials 'to the costs of trial or to the burdens of broad-reaching discovery' " (Pet. App. 6a (quoting *Harlow*, 457 U.S. at 817-818). In light of those precepts, the court explained, "[petitioner's] complaint of age discrimination must include 'non-conclusory allegations of evidence of [unconstitutional] intent' in order to survive a motion to dismiss." Pet. App. 6a. Moreover, the court noted (*id.* at 7a), relying on circuit precedent, in cases in which a defendant's subjective intent is an essential part of the claim,

> to avert dismissal short of trial, [the plaintiff] must come forward with something more than inferential or circumstantial support for his allegation of unconstitutional motive. That is, some *direct evidence* that the officials' actions were improperly motivated must be produced if the case is to proceed to trial.

Applying those principles, the court concluded that petitioner's amended complaint did not sufficiently state a claim of unconstitutional discrimination. The

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[1] The district court also held that petitioner's allegations against the EEO officer were insufficient to support a constitutional tort action and that, in any event, the officer was entitled to qualified immunity from suit under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). Pet. App. 17a-19a.

court explained that the complaint asserted only a "Title VII *prima facie* case"—which, the court observed, "is composed of only circumstantial evidence, and not overwhelming circumstantial evidence at that." Pet. App. 7a. In any event, the court added, petitioner's statistical allegations "would not meet even Title VII's liberal evidentiary standards." *Id.* at 9a. Referring to the allegations in paragraph 19 of the Amended Complaint, the court stated that it "agree[d] with the district court that the proffered statistics would be inadequate even in a statutory context." Quoting the district court's decision, the court stated that "[w]ithout evidence of the pool of available and qualified applicants, we could not know whether the 'three selections is [sic] disproportionately small to the pool, disproportionately large, or approximately statistically perfect.' " *Ibid.*[2]

## ARGUMENT

Petitioner asks the Court (Pet. 5-14) to decide whether a *Bivens* action alleging unconstitutional discrimination may be dismissed solely for want of allegations of direct evidence of improper motivation. In fact, however, the court below did not rest its decision solely on that basis. Rather, like the trial court, the court of appeals also examined petitioner's allegations of circumstantial evidence of discrimination, and held that those allegations were too conclusory to survive a motion to dismiss. That holding is plainly correct, is entirely factbound, and does not conflict with any decision of this Court or of any other court. Further review is therefore unwarranted.

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[2] The court also upheld the dismissal of petitioner's allegations against the EEO officer. Pet. App. 9a-11a. The petition does not present that issue. See Pet. 4 n.4.

Although the court of appeals noted (Pet. App. 7a-8a) petitioner's failure to allege direct evidence of discriminatory intent, it did not rest its decision solely on that ground. Rather, the court of appeals stated that "in any event," *i.e.*, even if allegations of circumstantial evidence may be sufficient, "we agree with the district court that the proffered statistics" were inadequate. Quoting the determinations of the trial court, the court of appeals explained that "[w]ithout evidence of the pool of available and qualified applicants, we could not know whether the 'three selections is [sic] disproportionately small to the pool, disproportionately large, or approximately statistically perfect.'" *Id.* at 9a.

In view of the bare-bones allegations of the amended complaint, that conclusion was entirely correct. Paragraph 19 contains the only relevant allegations, and none of them is sufficient. The paragraph first states that only three of the 20 appointments that respondent made to professional positions went to individuals who were 50 years old or older. Even if that allegation is correct, however, it does not permit an inference of discriminatory conduct, because there is no allegation tending to show that a ratio of three to 20 is disproportionately low. It may be, for example, that in the universe of candidates who applied for the 20 positions, there were only three who were 50 years old or older, and all three were selected. Or, it may be that there were more than three such candidates, but that the proportion of those candidates selected was higher than the proportion of candidates selected who were under the age of 50. Absent any allegation as to the relevant applicant pool, the assertion that three of 20 selectees were 50 years old or older, even if true, is simply not probative of discrimination. See Pet. App. 21a ("It may be that three selections is disproportionately small to the pool, disproportion-

ately large or approximately statistically perfect. Plaintiff does not say. The court does not know."); accord *id.* at 9a. Cf. *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115, 2121-2124 (1989).[3]

The second allegation in paragraph 19 suffers from the same flaw. It states that the 17 selectees who were not 50 years old or older were all 42 years old or younger. That assertion likewise fails to allege any basis for inferring discriminatory conduct. For example, it may be that none of the applicants for any of the 17 positions was over 42 years old; paragraph 19 does not allege otherwise. And while paragraph 19 alleges that 85% of the individuals selected by respondent were 42 years old or younger (17 out of 20), it does not state that such an 85% ratio is in any way disproportionate.[4]

The third and final allegation in paragraph 19 states that "[t]he average age of these selectees at the time of selection was 35.3 years of age." Amended Compl. ¶ 19 (C.A. App. 21). Again, that allegation, even if true, is without probative force, because there is no allegation regarding the average age of the applicant pool. Moreover, there is no allegation that the average age of the selectees is disproportionately low relative to the average age of the applicants. For all one can tell from the amended complaint, it may be

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[3] Of course, even if there were an allegation of disparity, it might be that the disparity could be explained on a legitimate nondiscriminatory ground. Here, there is no allegation of disparity.

[4] See also Pet. App. 9a n.6 ("Appellant curiously cut off the statistical analysis at age 42, rather than the age 40 suggested by the [Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*]. We do not know whether the statistical allegation would markedly change if the line had been drawn at age 40.").

that the average age of the individuals who applied was lower than the average age of the individuals selected.

In view of the conclusory nature of petitioner's allegations of improper motivation, the courts below were correct in concluding that the amended complaint could not survive a motion to dismiss. As petitioner acknowledges (Pet. 8), the courts of appeals that have addressed the question have "generally agree[d]" (*ibid.*) that in constitutional tort actions where, as here, the defendant's subjective intent is an essential element of the claim, the plaintiff's allegations are subject to a heightened pleading standard—according to which the plaintiff must point to specific, nonconclusory evidence of discriminatory intent in order to survive a motion to dismiss or a motion for summary judgment premised on qualified immunity. See, *e.g.*, *Collinson* v. *Gott*, 895 F.2d 994, 1002 (4th Cir. 1990) (Phillips, J., concurring in the judgment); *Rakovich* v. *Wade*, 850 F.2d 1180, 1210 & n.22 (7th Cir.) (en banc), cert. denied, 488 U.S. 968 (1988); *Pueblo Neighborhood Health Centers, Inc.* v. *Losavio*, 847 F.2d 642, 649 (10th Cir. 1988); *Elliott* v. *Perez*, 751 F.2d 1472, 1476 (5th Cir. 1985). Under that heightened pleading standard—which petitioner does not challenge and which is not the subject of a conflict among the circuits—the amended complaint cannot withstand a motion to dismiss.[5]

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[5] Because the court of appeals' decision does not turn on the absence of direct evidence of unlawful motivation, there is no merit to petitioner's claim (Pet. 14) that the court below has applied a different rule for *Bivens* cases than for cases brought against state officials under 42 U.S.C. 1983.

We note, finally, that even were the issue presented, petitioner has overstated the extent to which the circuits are in

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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conflict concerning whether a *Bivens* plaintiff must allege direct evidence of unlawful motivation. Although, as petitioner notes (Pet. 9), the Sixth Circuit in *Crutcher* v. *Kentucky*, 883 F.2d 502 (1989), stated that circumstantial allegations would suffice, another panel in that circuit, citing the D.C. Circuit's decision in *Martin* v. *D.C. Metropolitan Police Dep't*, 812 F.2d 1425, 1435 (1987), stated that the plaintiff must present "direct evidence that the officials' actions were improperly motivated" in order to survive a summary judgment motion based on qualified immunity. *Poe* v. *Haydon*, 853 F.2d 418, 432 (6th Cir. 1988), cert. denied, 488 U.S. 1007 (1989). Although *Crutcher* qualifies the decision in *Poe* (see 883 F.2d at 504), the law in the Sixth Circuit remains uncertain. Petitioner also relies (Pet. 9) on the separate opinion of Judge Phillips in *Collinson* v. *Gott*, 895 F.2d 994 (4th Cir. 1990), but there was no opinion of the court in that case. And in *Musso* v. *Hourigan*, 836 F.2d 736 (1988), on which petitioner also relies (Pet. 9), the Second Circuit did not address the issue at all.

* The Solicitor General is disqualified in this case.

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